

FILED

15 JAN 30 AM 11:06

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 14-2-07669-0 SEA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE HONORABLE JOHN CHUN
Noted For Consideration: February 3, 2015
ORAL ARGUMENT REQUESTED

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MOVE, INC., a Delaware corporation,
REALSELECT, INC., a Delaware
corporation, TOP PRODUCERS
SYSTEMS COMPANY, a British
Columbia unlimited liability company,
NATIONAL ASSOCIATION OF
REALTORS®, an Illinois non-profit
corporation, and REALTORS®
INFORMATION NETWORK, INC., an
Illinois corporation,

Plaintiffs,

v.

ZILLOW, INC., a Washington corporation,
ERROL SAMUELSON, an individual, and
DOES 1-20,

Defendants.

No. 14-2-07669-0 SEA

**DEFENDANTS' JOINT OPPOSITION
TO PLAINTIFFS' MOTION FOR
ORDER TO SHOW CAUSE RE
CONTEMPT**

DEFENDANTS' JOINT OPPOSITION TO
PLAINTIFFS' MOTION FOR CONTEMPT

LEGAL124867337.1

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF CONTENTS

1
2
3
4
5 I. INTRODUCTION 1
6 II. BACKGROUND 2
7 A. Samuelson Leaves Move to Work for Zillow..... 2
8 B. The Preliminary Injunction..... 3
9 C. Defendants’ Efforts to Comply and the Transition Documents 4
10 III. ARGUMENT..... 5
11 A. Standard for Contempt..... 5
12 B. The Transition Memorandum Did Not Violate the Preliminary
13 Injunction..... 6
14 C. Zillow Did Not Circumvent the Preliminary Injunction..... 9
15 D. Plaintiffs’ Remedy Is Impractical, Punitive, and Another Delay Tactic 11
16 IV. CONCLUSION..... 12
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Chao v. Gotham Registry, Inc.</i> , 514 F.3d 280 (2d Cir. 2008).....	6
<i>Copier Specialists, Inc. v. Gillen</i> , 76 Wn. App. 771, 887 P.2d 919 (1995).....	12
<i>Exel N. Am., Inc. v. Integrated Dispense Solutions LLC</i> , No. 14-CV-12646, 2015 WL 163990 (E.D. Mich. Jan. 13, 2015)	11, 12
<i>Gen. Signal Corp. v. Donallco, Inc.</i> , 787 F.2d 1376 (9th Cir. 1986)	6
<i>Heritage of Pride, Inc. v. Matinee NYC Inc.</i> , 2014 WL 3703871 (S.D.N.Y. July 23, 2014).....	11
<i>In re Dependency of A.K.</i> , 162 Wn. 2d 632, 174 P.3d 11 (2007).....	11
<i>Int’l Longshoremen’s Ass’n, Local 1291 v. Philadelphia Marine Trade Ass’n</i> , 389 U.S. 64, 88 S. Ct. 201, 19 L. Ed. 2d 236 (1967).....	5
<i>Johnston v. Beneficial Mgmt. Corp. of Am.</i> , 96 Wn.2d 708, 638 P.2d 1201 (1982).....	6, 7
<i>State v. Boren</i> , 44 Wn.2d 69, 265 P.2d 254 (1954).....	6
<i>State v. Norlund</i> , 31 Wn. App. 725, 644 P.2d 724 (1982).....	5
<i>Stella Sales, Inc. v. Johnson</i> , 97 Wn. App. 11, 985 P.2d 391 (1999).....	6
<i>W. Med. Consultants, Inc. v. Johnson</i> , 835 F. Supp. 554 (D. Or. 1993), <i>aff’d</i> , 80 F.3d 1331 (9th Cir. 1996).....	12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Wulfsberg v. MacDonald,
42 Wn. App. 627, 713 P.2d 132 (1986).....11

STATUTES

RCW 7.21.0106

RCW 7.21.040(2)(b).....12

OTHER AUTHORITIES

Wash. Prac. Civ. Proc. (Tegland, 2d ed. 2009).....11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

I. INTRODUCTION

Plaintiffs disingenuously twist Defendants’ prompt, good faith compliance efforts in July 2014 to manufacture an emergency cause for contempt. But Plaintiffs’ latest effort to avoid and delay a resolution of the merits goes too far. Contempt is perhaps the most potent weapon in a court’s arsenal, and it should not be invoked lightly. As with their underlying claims, Plaintiffs’ case for contempt is built around a scaffolding of speculation and mischaracterizations, rather than on a foundation of evidence and logic.

The Court should deny the Contempt Motion for several reasons. First, Plaintiffs have not shown that Defendants “intentionally” and “clearly” violated a court order, as the contempt standard requires. Plaintiffs rely on a memorandum excerpted from a document Mr. Samuelson drafted to facilitate his withdrawal from ongoing job responsibilities in the wake of the Preliminary Injunction (“the Transition Memorandum”). But the Transition Memorandum is nothing like the nefarious “smoking gun” that Plaintiffs make it out to be. On the contrary, the document demonstrates Defendants’ sincere efforts to comply with the Court’s order. Defendants were genuinely caught off guard by the scope of the Preliminary Injunction, and Zillow concluded that Mr. Samuelson should be placed on leave immediately (that very night). To transition his job responsibilities to others, Mr. Samuelson documented his open tasks, and sent the document to Zillow’s then-General Counsel Kathleen Philips, and specifically asked for her legal advice to ensure compliance with the injunction.¹

Any fair reading of the memorandum shows that it was an historical explanation of open matters, and it identified the persons in the best position to carry them forward while

¹ To minimize confusion, the source document that Mr. Samuelson wrote is the “transition document.” The memorandum excerpt based on that document (Cock Ex. A) is the “Transition Memorandum.”

1 Mr. Samuelson was on leave. Nothing in the injunction prevented others at Zillow from
2 continuing Mr. Samuelson’s tasks. As such, the memorandum does not reflect an attempt to
3 “circumvent” the Preliminary Injunction—it was a genuine effort to *comply* with it.
4

5
6 Second, there is no conspiracy here, and Zillow has nothing to hide. Zillow invites
7 the Court to review *in camera* the privileged e-mails between Mr. Samuelson and Ms. Philips
8 regarding the transition document, and the fully un-redacted version of the Transition
9 Memorandum. Zillow is confident that the Court will see the transition document for what it
10 is: a privileged, good faith effort to comply with the order. While Plaintiffs may disagree,
11 the order and the facts must be strictly construed in favor of the alleged contemnor.
12

13
14 Third, the Court should deny the Contempt Motion because the remedies Plaintiffs
15 seek are unreasonable, punitive, and inconsistent with the principles of civil contempt. Any
16 potential violation occurred almost eight months ago, which means there is no *ongoing*
17 violation of a court order. Moreover, there is no reason Plaintiffs could not inquire about the
18 Transition Memorandum or the transition document in the regular course of discovery, which
19 is actively managed by an experienced Special Master.
20

21 The Court should deny Plaintiffs’ Contempt Motion.
22

23 **II. BACKGROUND**

24 **A. Samuelson Leaves Move to Work for Zillow**

25 Errol Samuelson has worked in the real estate industry for over 20 years, including 10
26 years at Move, Inc. Declaration of Errol Samuelson in Support of Defendants’ Opposition to
27 Plaintiffs’ Contempt Motion (“Samuelson Decl.”), ¶ 2. Mr. Samuelson did not have a non-
28 compete clause with Move, meaning there was nothing to prevent him from working for
29 another company in the same industry. *Id.* In late 2013, Zillow, a Seattle-based real estate
30 company that competes with Move, approached Mr. Samuelson to discuss possible
31

1 employment. *Id.* ¶ 3. By late February, Zillow and Samuelson had agreed to most terms of
2 employment, but several significant issues remained unresolved until the very morning of his
3 resignation. *Id.* On March 5, 2014, Mr. Samuelson resigned from Move and began working
4 for Zillow. *Id.* At no point before or after Mr. Samuelson joined Zillow, did Mr. Samuelson
5 disclose to Zillow any of Move’s trade secrets. *Id.* ¶ 4. As set forth more fully in Zillow’s
6 Opposition to Modify the Case Schedule, after almost a year of litigation, Plaintiffs still have
7 not identified a single trade secret that Mr. Samuelson allegedly disclosed to Zillow. Instead,
8 Plaintiffs have sought to maintain their claim based solely on innuendo and strained
9 inferences (for example, their Trulia allegation which was specifically denied by the Special
10 Master (Dkt. No. 339) while delaying discovery of the merits and refusing to identify their
11 claims with reasonable particularity as required by law. Dkt. No. 342 at 1, 3-8.
12
13
14
15
16
17
18
19
20
21
22

23 **B. The Preliminary Injunction**

24 Move promptly sued both Mr. Samuelson and Zillow for misappropriation of trade
25 secrets, among other claims. Move also filed a motion for a preliminary injunction, which
26 was denied. On May 9, 2014, the Court heard oral argument on Move’s second motion for
27 preliminary injunction. Declaration of Katherine Galipeau (“Galipeau Decl.”), Ex. E. Based
28 on new evidence—much of which Plaintiffs did not allow Mr. Samuelson to see, and based
29 on arguments made at a hearing the Court removed him from attending—the Court granted
30 the second motion. *See* Samuelson Decl. ¶ 18. The Court directed Plaintiffs to prepare a
31 proposed order. Galipeau Decl., Ex. E. During the hearing the Court said that it did not
32 intend to enter an order that would “prevent [Mr. Samuelson] from being valuable to Zillow,
33 continuing to work for Zillow, and for Zillow to get value from the employee that they’ve
34 hired.” *Id.* The Preliminary Injunction itself was not entered until June 30, 2014, and did not
35 become effective until July 1, 2014. Dkt. Nos. 201 and 202.
36
37
38
39
40
41
42
43
44
45
46
47

1 With few edits, the Court simply signed Plaintiffs’ proposed Preliminary Injunction,
2 which featured pages of restrictions to keep Mr. Samuelson from competing against Move.
3 Given the Court’s statements about not intending to enjoin Mr. Samuelson from working at
4 Zillow, the sheer scope of the Preliminary Injunction was a surprise. In addition to enjoining
5 Mr. Samuelson from misappropriating Plaintiffs’ trade secrets, the order blocked Mr.
6 Samuelson from broad categories of work for six, nine, or twelve months from the date of the
7 injunction, or until this litigation is adjudicated. The only provision that enjoined Zillow,
8 however, was paragraph 2, which enjoined Zillow from “appropriating or obtaining or
9 seeking to appropriate or obtain from Mr. Samuelson, any of Plaintiffs’ Trade Secret
10 Information or any Move, Inc. and/or NAR confidential information . . . or utilizing in any
11 way such information previously obtained.” Preliminary Injunction at ¶ 2.
12
13
14
15
16
17
18
19
20
21
22

23 Defendants sought discretionary review, noting that the Preliminary Injunction was
24 not supported by evidence of actual or threatened misappropriation, was issued in violation
25 of due process by being based on evidence that Mr. Samuelson did not get to see (and thus
26 defend against), and was impermissibly overbroad and excessive in duration. On November
27 19, 2014, the Court of Appeals granted the motions for discretionary review and ordered
28 accelerated briefing on the merits to expedite the appeal. Galipeau Decl., Ex. F.
29
30
31
32
33
34

35 **C. Defendants’ Efforts to Comply and the Transition Documents**

36 The Preliminary Injunction was so broad that Zillow felt that it had no option but to
37 bar Mr. Samuelson from performing any work for Zillow or risk violating the order.
38 Declaration of Kathleen Philips (“Philips Decl.”), ¶ 3. Zillow immediately placed Mr.
39 Samuelson on leave and took other good faith efforts to comply. *Id.* ¶¶ 3-9.
40
41
42
43
44

45 In order to effect Mr. Samuelson’s sudden departure, Mr. Samuelson created a “work
46 in progress” document to hand off the in-progress tasks he could no longer work on and
47

1 forwarded it to Ms. Philips (“the transition document”). The transition document outlined
2 commitments and described the status of projects that were in progress *prior to* the
3 Preliminary Injunction. Samuelson Decl. ¶¶ 5-7. Mr. Samuelson’s intent was to “hand off
4 things that were in play,” rather than provide active management of these items. *Id.* ¶ 7.
5
6
7

8 Ms. Philips (whose dual role was General Counsel/Chief Operating Officer) then sent
9 portions of the transition document to individuals at Zillow who she determined should take
10 over Mr. Samuelson’s responsibilities. Philips Decl. ¶¶ 10-11. The Transition
11 Memorandum, which Plaintiffs characterize as a “smoking gun,” was one of these
12 transmittals. Some of these communications are privileged and were withheld accordingly,
13 i.e., the initial e-mails between Mr. Samuelson and Ms. Philips in which he was seeking her
14 legal advice regarding compliance with the injunction. But Zillow invites the Court to
15 review these documents *in camera* to see for itself that Defendants were not conspiring to
16 violate the Preliminary Injunction, but rather working diligently to comply with the order. *In*
17 *camera* review will demonstrate to the Court that (a) the transition document was a good
18 faith and valid method of complying with the Preliminary Injunction, and (b) neither
19 Defendant violated the Preliminary Injunction in drafting or distributing the documents.
20
21
22
23
24
25
26
27
28
29
30
31

32 **III. ARGUMENT**

33 **A. Standard for Contempt**

34 “The judicial contempt power is a potent weapon.” *Int’l Longshoremen’s Ass’n,*
35 *Local 1291 v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 76, 88 S. Ct. 201, 19 L. Ed. 2d
36 236 (1967). Accordingly, although the court has broad discretion, the contempt power must
37 be “exercised with caution.” *State v. Norlund*, 31 Wn. App. 725, 729, 644 P.2d 724, 726
38 (1982). Contempt does not lie where there has been “substantial compliance” with a court
39 order; mere “technical or inadvertent violations of the order will not support a finding of civil
40
41
42
43
44
45
46
47

1 contempt.” *Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986). By
2 statute, a finding of contempt is only justified for *intentional* and *clear* violations of court
3 orders. See RCW 7.21.010. In assessing whether behavior rises to the level of contumacious
4 conduct, “the order must be strictly construed in favor of the contemnor,” and “[t]he facts
5 found must constitute a plain violation of the order.” *Johnston v. Beneficial Mgmt. Corp. of*
6 *Am.*, 96 Wn.2d 708, 713, 638 P.2d 1201, 1203 (1982); *Stella Sales, Inc. v. Johnson*, 97 Wn.
7 App. 11, 20, 985 P.2d 391, 398 (1999). Moreover, the party seeking contempt bears the
8 burden to prove that there is an ongoing violation of the order at issue, and that a remedial
9 sanction can coerce compliance. *State v. Boren*, 44 Wn.2d 69, 73, 265 P.2d 254, 256 (1954).
10 This is a standard Plaintiffs cannot meet.
11

12
13
14
15
16
17
18
19
20
21 **B. The Transition Memorandum Did Not Violate the Preliminary Injunction.**

22 The Contempt Motion should be denied because the Transition Memorandum reflects
23 compliance with the Preliminary Injunction—not a violation of it. *Chao v. Gotham Registry,*
24 *Inc.*, 514 F.3d 280, 291 (2d Cir. 2008) (contempt denied where plaintiff failed to show that
25 “the defendant has not been reasonably diligent and energetic in attempting to comply”). By
26 its plain terms, the Preliminary Injunction enjoined Mr. Samuelson from working on certain
27 tasks from the effective date of the order; but Mr. Samuelson was not enjoined from
28 summarizing what he had done *before* the order, nor did it enjoin others from taking his
29 place. On this point, precision matters: the Preliminary Injunction did not proscribe *all*
30 Zillow employees from working on these projects (*e.g.*, obtaining direct feeds); it proscribed
31 *Mr. Samuelson* from working on them.² At its core, Plaintiffs’ motion takes issue with *other*
32 Zillow employees taking over activities that *Mr. Samuelson* was enjoined from doing. But in
33
34
35
36
37
38
39
40
41
42
43
44

45
46
47

² This is a point that Plaintiffs make in their most recent appeal brief arguing that the restraint provisions apply only to Mr. Samuelson and not to Zillow. Brief of Respondents at 32.

1 contempt proceedings, a court will not “expand by implication” the language in an order;
2 because “the results are severe, strict construction is required.” *Johnston*, 96 Wn.2d at 713.
3
4 And strictly construed, the Transition Memorandum did not plainly violate the order.
5

6
7 Nevertheless, Plaintiffs insist that Defendants “immediately def[ied] the Preliminary
8 Injunction,” and highlight several items listed in the Transition Memorandum to argue that
9 Mr. Samuelson was providing a “roadmap” for Zillow to circumvent the Preliminary
10 Injunction. But Mr. Samuelson was not providing a prospective roadmap, he was
11 accumulating in one place a historical account of what had *already happened*. He sent it to
12 Ms. Philips so she could review it for compliance, and assess what Mr. Samuelson could still
13 do without violating the injunction. And in most cases, Mr. Samuelson had already
14 communicated the relevant information to other Zillow employees before the injunction took
15 effect. Placed into context, it was a “checklist that collected in one place information that
16 had already been communicated” at Zillow. Samuelson Decl. ¶ 8.
17
18
19
20
21
22
23
24
25

26 [REDACTED]
27 [REDACTED]
28 [REDACTED]
29 [REDACTED]
30 [REDACTED]
31 [REDACTED]
32 [REDACTED]
33 [REDACTED]
34 [REDACTED]
35 [REDACTED]
36 [REDACTED]
37 [REDACTED]
38 [REDACTED]
39 [REDACTED]
40 [REDACTED]
41 [REDACTED]
42 [REDACTED]
43 [REDACTED]
44 [REDACTED]
45 [REDACTED]
46 [REDACTED]

47 The Court should decline Plaintiffs’ invitation to

1 convert the Preliminary Injunction into a general gag order.

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Once this context is taken into account, Plaintiffs’ argument falls apart. Neither the Transition Memorandum nor the transition document from which it was based, can possibly be construed as some nefarious blueprint on how to defy the Preliminary Injunction—each was a rather dry checklist of tasks that Mr. Samuelson would no longer work on.

C. Zillow Did Not Circumvent the Preliminary Injunction

Plaintiffs raise two arguments in an attempt to convince the Court to find Zillow in contempt. The first is that in “circulating the [Transition Memorandum], Zillow violated the Preliminary Injunction by transitioning Mr. Samuelson’s efforts to Mr. Beardsley and other Zillow employees.” Plf. Mot. at 9. On its face, this argument cannot be squared with the contempt standard (clear and intentional). Again, nowhere in the Preliminary Injunction does it specify that *Zillow* is enjoined from transitioning Mr. Samuelson’s job responsibilities to others. Mr. Samuelson may have been enjoined from obtaining direct feeds, but Zillow was not. In theory, Zillow could have hired a replacement for Mr. Samuelson. Instead, Zillow assigned pieces of Mr. Samuelson’s portfolio to others at the company. Replacing Mr. Samuelson does not violate the Preliminary Injunction. Additionally, the Court’s injunction was not about rewinding the clock (there had been no showing of misappropriation of each of the trade secrets) but about preventing potential *future* misappropriation. Nothing about the Transition Memorandum suggests a future misappropriation and, indeed, Plaintiffs do not point to a single trade secret allegedly misappropriated, historically or prospectively, by the Transition Memorandum.

Instead of showing how Zillow plainly violated the Preliminary Injunction, Plaintiffs suggest that Zillow’s attorneys engaged in some sort of “cover up.” Specifically, Plaintiffs allege that Zillow tried to hide the Transition Memorandum because (a) Zillow circulated

1 portions of the transition document after representing to the Court that Mr. Samuelson had
2 been placed on leave; and (b) Mr. Samuelson was instructed by his attorneys during a
3 deposition not to reveal “attorney-client communications.” Plf. Mot. at 6, 10. Plaintiffs are
4 quite fond of conspiracy theories, having invoked several already during this litigation. But
5 this latest theory crosses the line. Not only does it lack merit, but it is also needlessly
6 inflammatory in its suggestion that Zillow’s attorneys engaged in misconduct.
7
8
9
10
11

12 First, Mr. Samuelson *was* instructed back in July 2014 not to do any work for Zillow
13 pending a more thorough analysis of the broad and vague restrictions in the Preliminary
14 Injunction. Philips Decl., ¶ 5, Ex. 2. That Ms. Philips later circulated portions of the
15 Transition Memorandum does not make Zillow’s representation to the Court about Mr.
16 Samuelson’s leave misleading. Juxtaposing these two facts is not a legal argument for
17 contempt, it is a *non sequitur*.
18
19
20
21
22
23

24 Second, it was not improper for defense counsel to instruct Mr. Samuelson not to
25 answer a question that would have disclosed a privileged communication.³ As the *in camera*
26 review of these documents will show, the e-mail that Mr. Samuelson sent to Ms. Philips
27 objectively was seeking legal advice about compliance with the preliminary injunction. That
28 is the essence of a privileged communication. And, Defendants have most certainly shown
29 their good faith by producing the non-privileged documents forwarded to others at Zillow,
30 including the Transition Memorandum itself.⁴ Galipeau Decl. ¶¶ 3-4. A party should not be
31
32
33
34
35
36
37
38

39 ³ Plaintiffs assert that “Zillow has provided no privilege log to support its claim that privilege
40 protects the [Transition Memorandum] and related communications.” Plf. Mot. at 10. What
41 Plaintiffs omit is that they have not produced a privilege log either. Zillow is working on finalizing
42 its privilege log. Zillow also already provided Plaintiffs with the kind of information typically
43 contained in a privilege log for the documents relating to the Transition Memorandum. Galipeau
44 Decl. ¶ 5.

45 ⁴ Contrary to Plaintiffs’ allegations, Zillow has not tried to hide behind the veil of privilege
46 and has produced numerous documents which Ms. Philips authored or received. In contrast, Move
47 has produced virtually no emails that were authored, received or even CCed to its General Counsel,

1 allowed to hijack the Court’s contempt powers when it disagrees with a privilege call.
2

3 **D. Plaintiffs’ Remedy Is Impractical, Punitive, and Another Delay Tactic**
4

5 The Court should reject Plaintiffs’ proposed remedies for two reasons. First, there is
6 no ongoing violation of a court order. Lacking any claim on the merits, Plaintiffs have been
7 obstructionist and repeatedly delayed discovery of the underlying case, choosing instead to
8 pursue exclusively depositions regarding Defendants’ compliance efforts while refusing to
9 schedule merit depositions. *See* Dkt. No. 342 at 3-5. This type of “gotcha” tactics aimed at
10 buttressing a failing case are distasteful and unavailing. *See Heritage of Pride, Inc. v.*
11 *Matinee NYC Inc.*, 2014 WL 3703871, at *1 (S.D. N.Y. July 23, 2014) (“[I]f anyone behaved
12 badly here, it is Plaintiff, which seems to have engaged in ‘gotcha’ tactics that were designed
13 to set up a contempt application.”). Despite their efforts, Plaintiffs have come up empty,
14 pointing only to the Transition Memo: Since that time, Mr. Samuelson has been on leave and
15 has not been involved in any activities covered by the Preliminary Injunction. And, even
16 under the most charitable interpretation of Plaintiffs’ claims, neither Defendant has violated
17 the Preliminary Injunction since July 2014. *See Exel N. Am., Inc. v. Integrated Dispense*
18 *Solutions LLC*, No. 14-CV-12646, 2015 WL 163990, at *1 (E.D. Mich. Jan. 13, 2015)
19 (concluding, in the trade secret context, that “[t]here is no basis to hold Defendants in
20 contempt” because any violation was in the past, and “Defendants are already complying
21 with [the] order”). Punishing Defendants for past conduct would be punitive because
22 Defendants could not “purge the contempt” through compliance.⁵ *In re Dependency of A.K.*,

23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42 Mr. Caulfield, despite his extensive involvement in weekly executive meetings and annual planning.
43 Galipeau Decl. ¶ 6, Ex. C.

44 ⁵ “In the absence of a purge clause with permissible purge conditions, a finding of contempt
45 will normally be deemed punitive and will be reversed unless the trial court complied with the more
46 rigorous requirements associated with punitive sanctions.” Wash. Prac. Civ. Proc. (Tegland, 2d ed.
47 2009) § 43:8 (citing *Wulfsberg v. MacDonald*, 42 Wn. App. 627, 713 P.2d 132 (1986)).

1 162 Wn. 2d 632, 646, 174 P.3d 11, 18 (2007). Punitive sanctions can only be initiated by a
2 prosecuting attorney. RCW 7.21.040(2)(b).
3

4 Second, the Court should reject Plaintiffs’ proposed remedies because they are
5 impractical and unnecessary. In effect, Plaintiffs are asking for a “mini-trial” just to learn
6 more about a single document and thereby distract the parties’ attention and delay a trial on
7 the merits. Plaintiffs cannot continue to use this proceeding as a competitive tool. Prior to
8 the injunction, there was nothing wrong with Mr. Samuelson using his general experience
9 from 20 years in the industry to talk with MLSs and brokers and obtain direct feeds.⁶ But
10 that is exactly Move’s goal: ensuring Zillow’s ongoing reliance on ListHub. But its efforts to
11 prevent that competition through improper allegations of contempt must be denied. If
12 Plaintiffs have a legitimate claim on the merits they should identify it, and the parties should
13 proceed to trial. And, there is no reason why Plaintiffs cannot ask about the Transition
14 Memorandum during the existing discovery schedule. *See Exel N. Am.*, 2015 WL 163990 at
15 *2 (“At this stage in the litigation, Plaintiff has access to substantial discovery tools
16 Plaintiff does not need a court order to test Defendants’ compliance.”). And if Plaintiffs truly
17 believe that they need additional depositions—on this issue or any other—they should
18 request that relief from the Special Master actively engaged in resolving discovery disputes.
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

34 IV. CONCLUSION

35 Defendants respectfully request that the Court deny Plaintiffs’ Contempt Motion.
36
37
38
39

40 ⁶ Trade secret law does not prohibit an employee’s use of the skills, knowledge and
41 experience gained at one employer for the benefit of another. *W. Med. Consultants, Inc. v. Johnson*,
42 835 F. Supp. 554, 557 (D. Or. 1993), *aff’d*, 80 F.3d 1331 (9th Cir. 1996). In fact, under Washington
43 law, employers cannot even limit the use of know-how when a signed non-compete agreement exists
44 (and here, Move never bargained for a non-compete). *See Copier Specialists, Inc. v. Gillen*, 76 Wn.
45 App. 771, 774, 887 P.2d 919 (1995) (“The general rule in most jurisdictions is that skills acquired by
46 an employee during his or her employment do not warrant enforcement of a covenant not to
47 compete.”).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

DATED: January 30, 2015

/s/Kathleen M. O'Sullivan

Susan E. Foster, WSBA No. 18030
SFoster@perkinscoie.com
Kathleen O'Sullivan, WSBA No. 27850
KOSullivan@perkinscoie.com
Katherine G. Galipeau, WSBA No. 40812
KGalipeau@perkinscoie.com

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Defendant
Zillow, Inc.

CERTIFICATE OF SERVICE

On January 30, 2015, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the following document: **DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR CONTEMPT**

Jack M. Lovejoy, WSBA No. 36962
Lawrence R. Cock, WSBA No. 20326
Cable, Langenbach, Kinerk & Bauer, LLP
Suite 3500, 1000 Second Avenue Building
Seattle, WA 98104-1048
Telephone: (206) 292-8800
Facsimile: (206) 292-0494

- Via Hand Delivery
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Overnight Delivery
- Via Facsimile
- Via E-filing
- Via E-mail

jlovejoy@cablelang.com
LRC@cablelang.com
kalbritton@cablelang.com
jpetersen@cablelang.com

Clemens H. Barnes, Esq., WSBA No. 4905
Esteria Gordon, WSBA No. 12655
Daniel Oates, WSBA No. 39334
Miller Nash Graham & Dunn LLP
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
Telephone: (206) 624-8300
Facsimile: (206) 340-9599

- Via Hand Delivery
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Overnight Delivery
- Via Facsimile
- Via E-filing
- Via E-mail

clemens.barnes@millernash.com
connie.hays@millernash.com
estera.gordon@millernash.com
dan.oates@millernash.com
robert.mittenthal@millernash.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Brent Caslin, WSBA No. 36145
Richard Lee Stone , (*Pro Hac Vice*)
Nick G. Saros, (*Pro Hac Vice*)
Charles H. Abbott III, (*Pro Hac Vice*)
Jeffrey A. Atteberry, (*Pro Hac Vice*)
Samuel D. Green, (*Pro Hac Vice*)
Jenner & Block LLP
633 West 5th Street, Suite 3600
Los Angeles, CA 90071
Telephone: (213) 239-5150

bcaslin@jenner.com
rstone@jenner.com
nsaros@jenner.com
chabbott@jenner.com
jatteberry@jenner.com
sgreen@jenner.com

- Via Hand Delivery
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Overnight Delivery
- Via Facsimile
- Via E-filing
- Via E-mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of January, 2015.

s/ Vicki Lynn Babani
Vicki Lynn Babani
Legal Secretary

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

HONORABLE JOHN CHUN
Noted for Consideration: February 3, 2015
ORAL ARGUMENT REQUESTED

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MOVE, INC., a Delaware corporation,
REALSELECT, INC., a Delaware
corporation TOP PRODUCERS
SYSTEMS COMPANY, a British
Columbia unlimited liability company,
NATIONAL ASSOCIATION OF
REALTORS®, an Illinois non-profit
corporation, and REALTORS®
INFORMATION NETWORK, INC., an
Illinois corporation,

Plaintiffs,

v.

ZILLOW, INC., a Washington corporation,
ERROL SAMUELSON, an individual, and
DOES 1-20,

Defendants.

No. 14-2-07669-0 SEA

**[PROPOSED] ORDER DENYING
PLAINTIFFS' MOTION FOR ORDER
TO SHOW CAUSE RE CONTEMPT FOR
DEFENDANTS' VIOLATION OF
PRELIMINARY INJUNCTION**

THIS MATTER came before the Honorable John Chun on Plaintiffs' Motion for
Order to Show Cause re Contempt for Defendants' Violation of Preliminary Injunction. The

[PROPOSED] ORDER DENYING PLAINTIFFS'
MOTION FOR ORDER TO SHOW CAUSE RE
CONTEMPT FOR DEFENDANTS' VIOLATION
OF PRELIMINARY INJUNCTION – 1

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 judge having considered all pleadings and papers submitted in connection with Plaintiffs'
2
3 Motion, having heard the oral argument of counsel, and being fully advised in the premises,
4
5

6
7 IT IS ORDERED that Plaintiffs' Motion for Order to Show Cause re Contempt for
8
9 Defendants' Violation of Preliminary Injunction is DENIED.
10

11
12 ENTERED this _____ day of February, 2015.
13
14

15
16
17 _____
18 THE HONORABLE JOHN CHUN
19

20 Presented by:
21

22 **PERKINS COIE LLP**
23

24 By s/Kathleen M. O'Sullivan

25 Susan E. Foster, WSBA No. 18030

26 SFoster@perkinscoie.com

27 Kathleen M. O'Sullivan, WSBA No. 27850

28 KOSullivan@perkinscoie.com

29 Katherine G. Galipeau, WSBA No. 40812

30 KGalipeau@perkinscoie.com

31 **Perkins Coie LLP**

32 1201 Third Avenue, Suite 4900

33 Seattle, WA 98101-3099

34 Telephone: 206.359.8000

35 Facsimile: 206.359.9000
36

37 Attorneys for Defendant Zillow, Inc.
38
39
40
41
42
43
44
45
46
47

[PROPOSED] ORDER DENYING PLAINTIFFS'
MOTION FOR ORDER TO SHOW CAUSE RE
CONTEMPT FOR DEFENDANTS' VIOLATION
OF PRELIMINARY INJUNCTION – 2

56920-0025/LEGAL124897267.1

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

s/Clemens H. Barnes

Clemens H. Barnes, Esq., WSBA No. 4905

clemens.barnes@millernash.com

Estera Gordon, WSBA No. 12655

estera.gordon@millernash.com

Daniel Oates, WSBA No. 39334

dan.oates@millernash.com

Miller Nash Graham & Dunn LLP

Pier 70

2801 Alaskan Way, Suite 300

Seattle, WA 98121-1128

Telephone: (206) 624-8300

Facsimile: (206) 340-9599

Attorneys for Defendant Errol Samuelson

[PROPOSED] ORDER DENYING PLAINTIFFS'
MOTION FOR ORDER TO SHOW CAUSE RE
CONTEMPT FOR DEFENDANTS' VIOLATION
OF PRELIMINARY INJUNCTION – 3

56920-0025/LEGAL124897267.1

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

CERTIFICATE OF SERVICE

On January 30, 2015, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the following document: **[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE RE CONTEMPT FOR DEFENDANTS' VIOLATION OF PRELIMINARY INJUNCTION**

Jack M. Lovejoy, WSBA No. 36962	<input type="checkbox"/>	Via Hand Delivery
Lawrence R. Cock, WSBA No. 20326	<input type="checkbox"/>	Via U.S. Mail, 1st Class, Postage Prepaid
Cable, Langenbach, Kinerk & Bauer, LLP	<input type="checkbox"/>	Via Overnight Delivery
Suite 3500, 1000 Second Avenue Building	<input type="checkbox"/>	Via Facsimile
Seattle, WA 98104-1048	<input checked="" type="checkbox"/>	Via E-filing
Telephone: (206) 292-8800	<input checked="" type="checkbox"/>	Via E-mail
Facsimile: (206) 292-0494		
jlovejoy@cablelang.com		
LRC@cablelang.com		
kalbritton@cablelang.com		
jpetersen@cablelang.com		
Clemens H. Barnes, Esq., WSBA No. 4905	<input type="checkbox"/>	Via Hand Delivery
Estera Gordon, WSBA No. 12655	<input type="checkbox"/>	Via U.S. Mail, 1st Class, Postage Prepaid
Daniel Oates, WSBA No. 39334	<input type="checkbox"/>	Via Overnight Delivery
Miller Nash Graham & Dunn LLP	<input type="checkbox"/>	Via Facsimile
Pier 70	<input checked="" type="checkbox"/>	Via E-filing
2801 Alaskan Way, Suite 300	<input checked="" type="checkbox"/>	Via E-mail
Seattle, WA 98121-1128		
Telephone: (206) 624-8300		
Facsimile: (206) 340-9599		
clemens.barnes@millernash.com		
connie.hays@millernash.com		
estera.gordon@millernash.com		
dan.oates@millernash.com		
robert.mittenthal@millernash.com		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Brent Caslin, WSBA No. 36145
Richard Lee Stone , (*Pro Hac Vice*)
Nick G. Saros, (*Pro Hac Vice*)
Charles H. Abbott III, (*Pro Hac Vice*)
Jeffrey A. Atteberry, (*Pro Hac Vice*)
Samuel D. Green, (*Pro Hac Vice*)
Jenner & Block LLP
633 West 5th Street, Suite 3600
Los Angeles, CA 90071
Telephone: (213) 239-5150

bcaslin@jenner.com
rstone@jenner.com
nsaros@jenner.com
chabbott@jenner.com
jatteberry@jenner.com
sgreen@jenner.com

- Via Hand Delivery
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Overnight Delivery
- Via Facsimile
- Via E-filing
- Via E-mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of January, 2015.

s/Vicki Lynn Babani
Vicki Lynn Babani
Legal Secretary